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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ——

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Charles Dreher, Inspector in Charge United States Immigration Service, petitioners

v.

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, an Attorney, for Mary Cook and Antonio Danelon

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Arthur J. Karnuth, United States Director of Immigration, and Charles Dreher, Inspector in Charge United States Immigration Service, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on March 12, 1928.

QUESTIONS PRESENTED

1. Is a Canadian citizen residing in Canada, but employed in the United States, and who crosses the

boundary daily in passing from his home to his work, returning at night, an alien "visiting" the United States "temporarily for business," and therefore not an immigrant within the meaning of Section 3 of the Immigration Act of 1924, and not required to present an immigration visa as a condition to being allowed to enter the United States?

2. Notwithstanding later immigration legislation, may British citizens residing in Canada enter the United States under the Jay treaty of 1794 between the United States and Great Britain, which provided that—

> it shall at all times be free to His Majesty's subjects, and to the citizens of the United States * * * freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America * * *?

STATUTE, REGULATIONS, AND TREATY

Section 3 of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 154; U. S. C., Title 8, Sec. 203), provides:

> When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * *. (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure * * *.

General Order No. 86, dated April 1, 1927, prescribed by the Commissioner General of Immigra-

tion with the approval of the Secretary of Labor, provides:

> SUBJECT: Land border crossing procedure.
>
> 1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.
>
> 2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

Article III of the Jay Treaty of 1794, 8 Stat. 116, 117 (1 Malloy's Treaties, etc., 590, 592), between the United States and Great Britain provides:

> It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties on the continent of America * * *

and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. * * *

STATEMENT

The respondents, Mary Cook and Antonio Danelon, British subjects, sought admission to the United States from Canada on December 1, 1927. Neither was born in Canada. At a hearing before the Board of Special Inquiry, the respondent Mary Cook testified that she is a native of Scotland, and came to Canada in May, 1924. She resides in Niagara Falls, Ontario, and came to Buffalo to "look for a job," intending to return to her home in Canada each night. (R. 3–4, 21–25.) The respondent Antonio Danelon testified before the Board of Special Inquiry that he was born in Italy, came to Canada in 1923, and there became a Canadian citizen in 1924 by virtue of his father's naturalization. Since November, 1926, he has been employed by the United States Lighting and Heating Corporation at Niagara Falls, New York, crossing the boundary daily to engage in his work, and to return therefrom. When detained by the immigration authorities he was on his way to such employment, and intended to return, as was his custom, to his home in Niagara Falls, Ontario, that evening. (R. 4, 9–15.)

The respondent Mary Cook had never applied for an immigration visa (R. 23), but the respondent Antonio Danelon had applied for and had been

refused a visa (R. 13). After hearing, both aliens were excluded from admission on the ground that they were not in possession of an unexpired consular immigration visa required under the Immigration Act of 1924. (R. 17, 28.)

The respondents thereupon sued out a writ of habeas corpus, alleging in substance that they were unlawfully detained by the immigration authorities in that they were "nonimmigrants" and thus entitled to enter as aliens visiting the United States temporarily for business. (R. 3–6.) After hearing, the District Court for the Western District of New York dismissed the writ, because (*a*) they were not "nonimmigrants" visiting the United States temporarily for business but "immigrants" within the meaning of the Immigration Act of 1924, and that, therefore, the Secretary of Labor lawfully could prescribe the regulations contained in General Order No. 86; (*b*) that they were not protected as British subjects by the Jay Treaty of 1794; and (*c*) in any event the Jay Treaty does not apply to British nationals of other than Canadian birth. (R. 30–40.)

On appeal the Circuit Court of Appeals reversed the order of the District Court, holding in substance that the respondents were "nonimmigrants" under Section 3 (2) of the Immigration Act of 1924 because they were aliens visiting the United States temporarily for business; and that under the Jay Treaty of 1794 they were privileged to cross and recross the border for the purpose of business

and commerce, and such they were engaged in. (R. 49–53.)

SPECIFICATION OF ERRORS TO BE URGED

The errors which the petitioners urge as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Second Circuit are:

1. The court erred in reversing the order of the trial court.

2. The court erred in holding that the respondents were "nonimmigrants" under Section 3 (2) of the Immigration Act of 1924 as aliens visiting the United States temporarily for business.

3. The court erred in holding that the respondents were entitled to admission to the United States under the provisions of the Jay Treaty of 1794.

REASONS FOR GRANTING THE WRIT

1. The case is one of importance in the administration of the immigration laws. There is ground to contend that the intention of Congress as indicated by the circumstances which led to the enactment of the Immigration Act of 1924 and the provisions of the Act itself justify the regulations attacked and the construction of the Act of 1924 that such persons are immigrants.

2. The problem presented by the instant case is apparently a serious one in the administration of the immigration laws, and although the construction of the applicable statutes and treaties by the Circuit Court of Appeals is supported by respect-

able authority the question is not free from doubt. We have endeavored fairly to present the issues involved in the brief in support of this petition.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1928.

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BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinion of the District Court will be found on pages 30–40 of the record. The opinion of the Circuit Court of Appeals (R. 49–53) is reported in 24 F. (2d) 649.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on March 12, 1928. (R. 53.)

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The facts have been stated above in the petition Some other statutes and regulations are set forth in the appendix.

ARGUMENT

The main question is whether aliens residing in Canada and crossing the boundary daily to engage in labor or employment in the United States, returning to their homes at night, are immigrants within the meaning of the Act of 1924.

Section 3 of that Act defines as an immigrant an "alien departing from any place outside the United States destined for the United States," with certain exceptions. The only exception bearing on this case is of an—

> alien visiting the United States temporarily as a tourist or temporarily for business or pleasure.

The respondents were aliens departing each day from a place outside of the United States "destined for the United States," and are therefore immigrants unless their coming daily to the United States for work amounts to "visiting" the United States "temporarily for business."

If they are immigrants, they must present immigration visas. If born in Canada, they are not subject to the quota (see Section 4 (c), Immigration Act of 1924), and may obtain a visa on showing that they have the mental, moral, and physical qualifications required by the immigration laws. If not born in Canada, even though British subjects, they may not obtain visas unless in compliance with the quota provisions of the Act of 1924.

For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants.

Prior to the promulgation on April 1, 1927, of General Order No. 86, above quoted, the following regulations were in effect:

Rule 1, Subdivision K, of the Immigration Rules of March 1, 1927, provided:

> PARAGRAPH 1. The head tax shall not be levied in respect of the following classes of aliens: * * *
>
> (*f*) Aliens who, without taking up residence in the United States, habitually cross and recross the land boundaries and who hold the identification card prescribed in paragraph 1, subdivision Q of Rule 3.

Rule 3, Subdivision Q, provides:

> With a view to avoiding delays and embarrassment in cases of aliens and citizens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. * * *

On April 1, 1927, by General Order No. 86, issued by the Department of Labor, aliens residing in Canada and crossing daily to work were classified as immigrants within the meaning of the Act of 1924. This new construction of the Act resulted from protests of labor organizations against the cheap labor thus obtaining occupation in the United States and from protests of employers too far from the boundary to be able to employ such cheap labor, and who suffered in competition with those employers near the boundary engaged in similar kinds of business.

Since the order of April 1, 1927, went into effect it has been generally complied with by native-born Canadians, as they obtain visas, on showing their physical, mental, and moral qualifications, without regard to the quota, and are thereupon supplied with identification cards, but aliens not Canadian born, such as these respondents, can not obtain visas unless within the quota, and that is where the shoe pinches.

If the respondents are not immigrants, but temporary visitors for business purposes, they may enter without visas by virtue of Executive Order No. 4476 (Immigration Rules, March 1, 1927, pp. 88, 89)—by which—

> citizens of Canada * * * and British subjects domiciled therein * * * may * * * enter the United States temporarily without passports or visas.

The reasons for the opinion that aliens residing in Canada and coming across the boundary daily to work are persons visiting the United States temporarily for business and not immigrants are well stated in the opinion of the Circuit Court of Appeals. (R. 49–53.) That court says that the word "immigrant" is commonly understood to mean an alien who comes to the United States for permanent residence, and that the word "business" as used in the Act of 1924 is broad enough to include working for wages or salary.

It must be admitted that the decision below has much to support it, and the fact that the Depart-

ment of Labor so construed the Act of 1924 from its passage until April 1, 1927, is not to be overlooked.

On the other hand, if persons in the situation of respondents are not immigrants and not subject to the restriction of the immigration laws, aliens who can not comply with any of the requirements of those Acts may be permanently employed in the United States, and this results in influx of cheap labor along the boundary which the immigration laws are designed to prevent. Many aliens inadmissible under the Immigration Acts, who gain access to Canada and reside near the border are allowed, under the decision below to engage continuously in employment in the United States, and this without payment of the head tax required by Section 2 of the Act of 1917 of every alien entering the United States, except those who enter—

> after an uninterrupted residence of at least one year immediately preceding such entrance in the Dominion of Canada * * * for a temporary stay.

So far as the Jay Treaty is concerned, the section we are now concerned with may well have been abrogated by the war of 1812 if other sections were not, and in any event will be considered modified by subsequent Acts of Congress inconsistent therewith, but if the provisions of the treaty pertinent thereto were not abrogated by war, the Immigration Acts should not be construed to repeal the Treaty, if that result reasonably may be avoided.

For a discussion of the events and negotiations leading up to the conclusion of the Jay Treaty, attention is called to the work entitled "Jay's Treaty, a Study in Commerce and Diplomacy," by Samuel Flagg Bemis (MacMillan, New York, 1923). It is sufficient in the present discussion to say that nothing has been discovered in the history of the Treaty to support the view that it was designed to cover admission to either Canada or the United States of the nationals of the other for the purpose of permanent employment. The phraseology of Article III itself and the negotiations leading up to its adoption indicate that it relates to trade and commerce between the United States and Canada. Its sole object was evidently to promote free commercial intercourse across the Canadian border. This view is sustained by the views expressed by John Jay, who conducted the negotiations for the United States, in his letter of November 19, 1794, to Secretary of State Randolph, in which he said:

> The third article will, I presume, appear to you in a favorable light; a number of reasons which, in my judgment, are solid, support it. I think they will, on consideration, become obvious. It was proposed and urged that the commercial intercourse opened by this article ought to be exempted from all duties whatever on either side. The inconvenience which we should experience from such a measure were stated and examined; it was finally agreed to subject it to native

duties. (American State Papers, Foreign Relations, Vol. I, p. 503.)

It has been a disputed question as to whether the War of 1812 between the United States and Great Britain terminated in whole or in part the Jay Treaty of 1794. On the question see American State Papers, Foreign Relations, Vol. IV, pages 354–355, 357; Moore's International Law Digest, Vol. V, par. 779; Footnotes on pages 580 and 590, Malloy's Treaties, etc., Vol. 1, and cases cited.

Many of the cases cited in the above authorities relate to land tenure and other rights which vested under the Jay Treaty. No case has been discovered with reference to the right of immigrants under the Jay Treaty, except *McCandless* v. *United States ex rel. Diabo* (March, 1928, C. C. A. 3), 25 F. (2d) 71, relating to the right of Canadian Indians to enter the United States under the Jay Treaty.

CONCLUSION

We have tried to set forth as briefly as possible the questions presented and the respective contentions. We can not say that the position of the petitioners is a strong one, and unless it appeals to the Court as having sufficient substance to afford a substantial prospect of reversal there is nothing to be gained by a review on certiorari.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1928.

APPENDIX

STATUTES AND REGULATIONS

Section 3 of the Immigration Act of 1917 (c. 29, 39 Stat. 874, 875, 876; U. S. C. Title 8, Sec. 136) provides:

> That the following classes of aliens shall be excluded from admission into the United States: * * * persons hereinafter called contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; * * *.
>
> * * * * * *
>
> * * * *Provided further,* That skilled labor, if otherwise admissible, may be imported if labor of like kind unemployed can not be found in this country, and the question of the necessity of importing such skilled labor in any particular instance may be determined by the Secretary of Labor upon the application of any person interested, such application to be made before such importation, and such determination by

the Secretary of Labor to be reached after a full hearing and an investigation into the facts of the case: *Provided further,* That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, person belonging to any recognized learned profession, or persons employed as domestic servants * * *.

The applicable provisions of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 154, 155, 161, 166; Su. U. S. C. 8, Secs. 203, 205, 213, 222, 223), are:

SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure * * *.

SEC. 4. When used in this Act the term "non-quota immigrant" means—

* * * * *

(c) An immigrant who was born in the Dominion of Canada * * *.

SEC. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant * * * by reason of being excepted from the operation

of any other law regulating or forbidding immigration.

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

* * * * *

SEC. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

SEC. 25. The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the pro-

> visions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

Paragraph 48 of General Instruction Consular, No. 926, prescribed September 30, 1925, by the Secretary of State in accordance with Section 24 of the Immigration Act of 1924, provides (p. 14):

> Temporary visits, except under rule 8 of the Immigration Rules, July 1, 1925, for the purpose of performing labor for hire are not considered to be within the purview of section 3 (2) of the act. However, personal servants accompanying their employers who are tourists or business men visiting the United States on a temporary visit and leaving with them might be granted passport visas under this section.

○

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 198

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Charles Dreher, Inspector in Charge, United States Immigration Service, Petitioners

v.

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, an Attorney, for Mary Cook and Antonio Danelon

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Arthur J. Karnuth, United States Director of Immigration, and Charles Dreher, Inspector in Charge, United States Immigration Service, respectfully petition the Court to set aside the order of October 8, 1928, denying the petition for a writ of certiorari herein and to reconsider the petition.

As ground for petition for rehearing, your petitioners respectfully state that the denial of said petition for certiorari leaves in effect the decision of the Circuit Court of Appeals for the Second Cir-

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cuit holding that an Article in the Treaty of 1794 between the United States and Great Britain is still in force, for which reason the decision is of serious and far-reaching effect upon the administration of the three main statutes of the United States so far as concerns the control of and check upon the entry of aliens into the United States across the boundary between the United States and Canada. This decision will have consequences of grave public importance which were not perceived at the time the petition for writ of certiorari herein and supporting brief were filed in this Honorable Court.

A further ground for petitioning for a rehearing of the petition is that it also now has been found that the consequence of the decision of the Circuit Court of Appeals in its holding as to what constitutes an alien visiting the United States temporarily for business was not sufficiently emphasized in the petition and supporting brief, a construction of law which, it appears, will have disastrous results upon the immigration laws regulating the entrance of aliens into the United States not alone across the Canadian border but across the Mexican border and at seaports of the United States as well.

The Circuit Court of Appeals in its opinion (R. 52) flatly declares that the Jay Treaty of 1794 was not terminated by the War of 1812. This well may be, and yet the particular article in question be abrogated by that war. In view of the fact that mutual rights were granted by Article III to British subjects and American citizens, as well as

to Indians dwelling on either side of the border, it reasonably might appear that any question regarding whether the treaty is in force and effect is a political and not a judicial one, since rights of citizens of both Great Britain and the United States are involved and the ruling of the Circuit Court of Appeals accords the privilege of free passing to persons residing in Canada without any regard to whether the same right is granted to residents of the United States, a matter which properly could not be brought out in the record in the instant case. Many of the cases cited by the court in support of its decision on this point relate to property and other rights vested under the treaty, prior to the War of 1812, and are not in point in the matter at issue. The only case cited which might be in point is *McCandless* v. *United States ex rel. Diabo*, 25 F. (2) 71, March 9, 1928, which held that North American Indians had a right under the treaty to cross the Canadian border into the United States. A review of that case by this Honorable Court was not sought because that question became moot as to Indians by reason of the passage of special legislation on April 2, 1928 (c. 308, 45 Stat. 401), which recognized that right.

While the court referred only to the Treaty of 1794, it is a fact that subsequent to that treaty and the War of 1812, the Treaty of Ghent of 1814 (8 Stat. 218, 222), in Article IX thereof, "restored" to the Indians the rights which they had prior to the war, but this treaty did not "restore" any rights to

other British subjects in Canada. The fact that the Treaty of Ghent thus "restored" rights only to the Indians distinguishes that case from the instant case and is evidence that both countries recognized that this article of the Treaty of 1794 had been abrogated by the War of 1812. This point seems not to have received the consideration of the Circuit Court of Appeals in its decision, which affects not only the Department of the Government charged with the administration of the immigration laws, but the Department charged with the conduct of our foreign relations. As a consequence of the decision as it now stands it is respectfully pointed out that not only British subjects of the white and black races, but also of the Oriental races, can enter Canada and immediately gain admission to the United States for practically an indefinite period without regard to the immigration laws which forbid the admission as immigrants of persons ineligible for citizenship. In fact, it follows that persons of any nationality must be admitted to the United States under this decision without regard to the immigration laws so soon as they become lawfully domiciled within Canada and thereby become British subjects. It is inconceivable that Congress in providing for treaty obligations in Section 3 (2) and Section 3 (6) of the Act of May 26, 1924, intended such result, as it is apparent that in its definition of the word "alien" in the Immigration Acts of 1917 and 1924 the admissibility of all aliens to the United States must

be determined under those laws and no special exemption was to be accorded British subjects under the Treaty of 1794. (Page 4, Report 350, Committee on Immigration and Naturalization, House of Representatives, first Session, 68th Congress, to accompany H. R. 7995, which became the Immigration Act of 1924.)

It would also appear to follow that if the decision of the Circuit Court of Appeals is to remain in effect the Acts of Congress which authorize passports and visas to be required of aliens would be unenforceable and without effect with respect to aliens domiciled in Canada but owing permanent allegiance to Great Britain, although for several years an Executive Order issued under such Acts of Congress, upon the recommendation of the Secretary of State, has required passports and visas in such cases as a condition to enter.

It is respectfully submitted that the decision of the Circuit Court of Appeals as to the effect of the Treaty of 1794 on the immigration laws is one which justifies the consideration of this Honorable Court for the reason that if under the facts of the instant case the treaty is in force and effect it was unnecessary for that court to consider the other point involved in the case as having any material bearing on the rights of the petitioners to admission to the United States. If the treaty rights granted under Article III are no longer in force by reason of the War of 1812 and the failure to restore such rights to British subjects in the Treaty of Ghent of

1814, or by reason of the enactment by Congress of immigration laws which seem to be in hopeless conflict with the Treaty of 1794, it is of general public importance that the question be settled by this Honorable Court so that orderly administration of the immigration and passport laws may follow and their provisions be effective.

It is fair to state that while Section 15 of the Immigration Act of 1924 gives authority to exact a bond to insure that an alien admitted to the United States for a temporary period shall depart at the end of his stay there is some doubt that power exists to exact such bond in the class of cases involved under the decision of the Circuit Court of Appeals if that part of its decision is sound that the Treaty of 1794 is in force and effect, as it seems unreasonable to hold that the Government has any power to restrict the treaty right freely to pass and repass the border by insisting on bond to insure departure. Inability to furnish bond or attempt by administrative officers to make the bond so high as to be prohibitive would serve to prevent enjoyment of the treaty right, and under the court's decision the attempt to exact bond would appear to be an illegal exercise of power. Without the Government having the protection of a bond experience indicates that a large number of aliens admitted for temporary stay would disappear into the interior of the United States, to remain here unlawfully.

The decision of the Circuit Court of Appeals on the other point in the case is that an alien who is a Canadian citizen residing in Canada and who seeks to enter the United States to work each day in the United States, or to look for work in the United States, returning each night to his home in Canada, his employment in the United States to be permanent and indefinite in duration, is within the meaning of Section 3 (2) of the 1924 Immigration Act an exception to the definition of the term "immigrant" as used in that section in that he is "visiting the United States" "temporarily for business."

In solving this question the Circuit Court of Appeals first gave much consideration to cases which discussed the meaning of the word "immigrant" in reference to Immigration Acts other than the Immigration Act of 1924, as well as to the meaning accorded that word by the lexicographers, and thus read into that term at the outset the element of immigration for permanent residence. This appears unnecessary and unwarranted for the reason that that element is not included in the definition of the word "immigrant" in the Immigration Act of 1924. The term is defined in Section 3 of that Act as meaning "any *alien* departing from any place outside the United States destined for the United States," the term "alien" being defined in Section 28(b) as including "any individual not a native-born or naturalized citizen of the United States," excepting only from this definition Indians of the United

States not taxed and citizens of the islands under the jurisdiction of the United States.

In deciding that the aliens involved in this case are within the exception to the term "immigrant," defined in subdivision 2 of Section 3, the Circuit Court of Appeals gave the broadest possible construction to the word "business." It is unquestioned that one of the purposes of the immigration laws is to protect the people of the United States from the influx of peoples of other races and nationalities with living standards lower than our own. To accord to the term "visiting the United States temporarily for business" a meaning so broad as to bring consequences which conflict with the plain intent of Congress would appear to be unwarranted and unjustified, because, at the most, on its face the term seems to be used to comprehend such a reference to trade and commerce not specifically covered by the usual treaty provisions regarding commerce and navigation.

It does not appear unreasonable to assume that the "business" referred to in the Act must have its origin or inception in that country from which the alien departs for the United States, or be business between the two countries. The construction placed by the Secretary of Labor upon this clause in the Act as applied to the petitioners is one calculated to interfere the least with ordinary trade and commerce originating in Canada, and the passage of aliens across the border in legitimate business, whereas the construction of the Circuit Court of

Appeals if carried to a conclusion would require the examination of every alien of this class each morning and another examination again on departure in order to carry out the head tax and other requirements of the immigration laws. The method adopted by the administrative officers being a sensible and practical one and not arbitrary or capricious, it would appear that the Departmental regulation is justified under a fair construction of the intent of Congress as expressed in the law.

In another respect it would appear to be proper for this Honorable Court to consider the consequences of the decision of the Circuit Court of Appeals on this point. The record shows that one of these aliens was applying for daily admission to work at employment of a permanent nature and not to a new job each day. If the decision be permitted to stand, it would follow that any alien seeking to enter the United States at any port of entry for the purpose of working or engaging in labor of any kind, whether the job be of temporary or permanent duration, or to look for work, must be permitted to enter if he shows that he intends to depart, for instance, at the end of each week, or each month, or at the end of each six months or even less often. The period of stay would depend only upon a fair construction of the term "temporary," and a reentry could be gained immediately thereafter under the same conditions and repeated times without number, without regard for quota

and visa restrictions, so that his job in this country practically would be of permanent duration. Having to depart only so often that the stay can be considered temporary, say every six months, a great influx of foreign labor into our interior cities is to be expected. This ingress into the interior of the United States would only be limited to the extent that the cost of transportation to the nearest border port at the end of each temporary period might be more than the laborers could afford.

The result of the decision is that not only are the gates thrown open at the Canadian border, but hordes of aliens can enter along the Mexican border and from the West Indies through ports in our southeastern States. In fact, under the court's construction of what constitutes an entry "temporarily for business," a way is open for the entry of laborers from those countries unrestricted except for the fact that a reasonable bond may be exacted to insure departure at the end of the temporary stay. It is unthinkable that Congress intended such a situation or that any fair and reasonable construction of the language used by Congress, bearing in mind the manifest intent of the immigration laws, warrants such construction as that adopted by the Circuit Court of Appeals for the Second Circuit.

In view of the consequences stated which reasonably may be expected to follow the broad construction given by the Circuit Court of Appeals to the

term "temporarily for business," it would seem to be the duty of the Government to give the strictest possible construction to the decision of the court. That course will undoubtedly result in a multiplicity of suits on the part of persons interested in extending the scope of the court's decision in the broadest possible manner.

Furthermore, if the Circuit Court of Appeals is correct in holding that these aliens are admissible under the statutory exception relating to aliens coming to the United States temporarily for business, the court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government.

The foregoing petition filed at the earnest request of the Department of Labor and prepared in that Department presents the case from the standpoint of those most familiar with the operation of the immigration laws and the effect of the decision of the court below.

Wherefore, your petitioners respectfully pray that a rehearing and a reconsideration of the petition for certiorari filed in this case be granted.

WILLIAM D. MITCHELL,
Solicitor General.

ALBERT E. REITZEL,
BART W. BUTLER,
Assistant Solicitors, Department of Labor.

NOVEMBER, 1928.

CERTIFICATE OF COUNSEL

The undersigned, counsel for the petitioners, hereby certify that the Petition for Rehearing of the Petition for Certiorari in this cause filed this day is presented in good faith and not for delay.

WILLIAM D. MITCHELL,
Solicitor General.

ALBERT E. REITZEL,
BART W. BUTLER,
Assistant Solicitors, Department of Labor.

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